UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

JOSEPH MICALI, Appellant, v. DEPARTMENT OF THE TREASURY, Agency.	DOCKET NUMBER NY0752910214-I-3 DATE: DEC 2 1 1992

Lawrence Berger, Esquire, Mahon & Berger, Garden City, New York, for the appellant.

Bonnie Edwards, Esquire, New York, New York, for the agency.

BEFORE

Daniel R. Levinson, Chairman
Antonio C. Amador, Vice Chairman
Jessica L. Parks, Member

OPINION AND ORDER

The appellant has petitioned for review of an initial decision that sustained his removal. For the reasons set forth below, we GRANT the petition for review under 5 C.F.R. § 1201.115 and AFFIRM the initial decision as MODIFIED by this Opinion and Order, still SUSTAINING the agency's removal action.

BACKGROUND

The appellant was removed from his GS-13 Criminal Investigator position effective January 25, 1991, based on a charge that he failed to fully report his spouse's income on their 1987 and 1988 joint Federal income tax returns. *See* Initial Appeal File 1 (IAF 1), Tab 3, Subtabs 4A, 4B, 4D. On February 14, 1991, he filed an appeal of his removal with the Board's New York Regional Office. *See id.*, Tab 1. In his petition for appeal, the appellant alleged, inter alia, that his spouse earned no "income" from her business activities and therefore her receipts did not trigger a tax reporting requirement. *See id.* On April 5, 1991, the administrative judge dismissed the appeal without prejudice to refiling within 6 months from the date of the initial decision, to allow the appellant to apply for disability retirement benefits. *See* IAF 1, Tab 11.

The appellant timely refiled his petition for appeal pursuant to the administrative judge's April 5, 1991 initial decision. *See* Initial Appeal File 2 (IAF 2), Tab 1. However, because the Office of Personnel Management (OPM) had not yet acted on the appellant's application for disability retirement benefits, the appellant again moved to dismiss the appeal without prejudice. On September 30, 1991, the administrative judge dismissed the appeal without prejudice to refiling within 6 months from the date of the initial decision or within 1 month from the date of an initial decision by OPM on his application for a disability retirement. *See id.*, Tab 6.

The appellant timely refiled his petition for appeal on November 7, 1991, following OPM's "preliminary decision" to deny his application for a disability retirement. *See* Initial Appeal File 3 (IAF 3), Tab 1.[1] After affording the appellant a hearing, at which he did not testify or present any witnesses, the administrative judge issued a March 11, 1992 initial decision that sustained the charge and affirmed the removal action. *See* Initial Decision (I.D.), IAF 3, Tab 22.

The appellant has filed a timely petition for review in which he alleges that the administrative judge erred in interpreting the Internal Revenue Code (IRC). *See* Petition for Review File (PFRF), Tab 1. He further argues that the administrative judge erred by not mitigating the removal penalty. *See id.* The agency has responded in opposition to the petition.[2] *See* PFRF, Tabs 9, 10.

ANALYSIS

The agency proved the charged conduct.

The appellant was a Criminal Investigator responsible for, inter alia, planning and conducting tax evasion cases and assisting in the prosecution of criminal tax violations. *See*

[1] The appellant raised the affirmative defense of handicap discrimination in his appeal but withdrew this claim prior to the hearing. *See* IAF 3, Tabs 1, 10.

[2] The agency requests that the Board dismiss the appellant's petition for review because it was not signed by the appellant or his designated representative in accordance with 5 C.F.R. § 1201.114(a). *See* PFRF, Tab 9 at 2, and Tab 10 at 2. However, the record shows that the petition for review was signed by the appellant's designated representative. *See* PFRF, Tab 1 at 1; *see also* PFRF, Tab 4. Therefore, we DENY the agency's request.

IAF 1, Tab 7 at 8. During 1987 and 1988, the appellant's spouse worked as a waitress and operated a clothing design business. *See id.*; IAF 1, Tab 3, Subtab 4D. The appellant claimed that his spouse channeled all of her waitressing earnings into her business and that, even so, her business did not earn a profit. The couple's 1987 and 1988 joint Federal income tax returns did not include a statement of the spouse's earnings or expenses from either her waitressing job or her business. *See* IAF 1, Tab 3, Subtabs 4K, 4M.

The agency charged the appellant with failing to fully report his spouse's income on their joint Federal income tax returns for 1987 and 1988 in violation of § 216.7 of the Internal Revenue Rules of Conduct, Document 7098, which provides that "[e]mployees will timely and properly file all required tax returns." *See* IAF 1, Tab 3, Subtabs 4D, 4O, 4P, 4Q. Specification 1 in support of the charge alleged that he failed to report his spouse's earnings from employment as a waitress in 1987 and 1988, amounting to between $2,000 and $2,500. Specification 2 alleged that he failed to report $4,074.94 in earnings in 1987 and 1988 from his spouse's business. Specification 3 alleged that he stated to an agency investigator in May 1990 that he did not intend to file amended joint Federal income tax returns for the years in question. *See id.*, Subtab 4D. The appellant stipulated that he had engaged in the conduct alleged in the specifications, but denied that he had done anything wrong. *See* IAF 3, Tab 7 at 8-9; I.D. at 5-6.

The administrative judge determined in his initial decision that the agency provided unrebutted evidence showing that the appellant's spouse had earned between $2,000 and $2,500 in wages and tips as a waitress and $4,074.96 from her business, and that the appellant had failed to report these earnings on their 1987 and 1988 joint Federal income tax returns and had failed to file amended returns as charged. *See* I.D. at 11. He further found that the appellant failed to establish the expenses that allegedly offset his spouse's earnings and negated his duty to report them for tax purposes. *See* I.D. at 12. In addition, the administrative judge found that the appellant's statement that he lacked culpable intent to not fully report his spouse's income was not credible in light of his 5 years of service as a Revenue Agent and 7 years of service as a Criminal Investigator, and in light of the fact that he had signed his tax returns for the years in question, thereby acknowledging, under penalty of perjury, the truth of the statements contained in those tax returns. *See* I.D. at 12-13. Finding the penalty reasonable, the administrative judge thus sustained the removal action. *See* I.D. at 8-10, 15-16.

In his petition for review, the appellant first alleges that the administrative judge misinterpreted the IRC by finding that the appellant had failed to report his spouse's earnings from her business and her job as a waitress, because her earnings were not "income" and did not trigger a reporting requirement. *See* PFRF, Tab 1 at 4. He claims that the

initial decision did not address his argument that he was only required to report his spouse's "gross income," that is, her gross receipts less the cost of goods sold. *See id.* at 3-4. Because, the appellant contends, his spouse's business earnings were completely offset by a corresponding business loss, there was no "gross income" to report.

The administrative judge found "that the appellant's [spouse] had income that he did not report on his tax return." I.D. at 12. He did not reach the question of whether the appellant was required to report that income. The administrative judge assumed that the appellant's spouse's earnings were "income" without determining whether they were "income" under the IRC. This was error. However, the record is sufficiently developed so as to render a remand on this question of tax law unnecessary.

"Every individual having for the taxable year gross income which equals or exceeds" that year's exemption amount must file a Federal income tax return. 26 U.S.C. § 6012(a)(1)(A). Therefore, it is "gross income" that triggers the filing requirement. *See id.* The IRC defines "gross income" as "all income from whatever source derived." 26 U.S.C. § 61(a); *see* 26 C.F.R. § 1.61-1(a). The appellant's spouse's earnings do not fall under any specific statutory exclusion in the IRC from "gross income." *See* 26 U.S.C. §§ 101-136. Thus, it is axiomatic that these earnings are "gross income" and must be reported. *See Gardiner v. United States*, 391 F. Supp. 1202, 1206-07 (D. Utah 1975),

aff'd, 536 F.2d 903 (10th Cir. 1976). The appellant may not account for the alleged offsetting business expenses incurred by his spouse by performing a mental calculation and then deciding not to report them at all. Rather, he must report them by including them in the couple's "gross income," and account for the expenses by deducting them from the couple's "gross income" to arrive at their "adjusted gross income" under 26 U.S.C. § 62(a)(1). *See Boone v. United States*, 482 F.2d 417, 419 n.3 (5th Cir. 1973); *Gardiner*, 391 F. Supp. at 1207.

The appellant was a GS-13 Criminal Investigator responsible for enforcing the IRC by investigating criminal violations of the tax laws. As such, he had a particular expertise in the provisions of the IRC. Furthermore, the record establishes that the appellant knew how to report business income, because he properly reported the income from his own consultant business activities on the couple's 1987 and 1988 joint Federal income tax returns, the very tax years at issue in this appeal. *See* IAF 1, Tab 3, Subtabs 4K, 4M. Therefore, the appellant's assertion that he was under no obligation to report his spouse's earnings because it was not income is patently frivolous. We find that the appellant failed to report approximately $6,000 in his spouse's income on their 1987 and 1988 joint Federal income tax returns, and failed to amend the returns to report his spouse's income.

Next, the petition for review contains a long discussion of the appellant's purported lack of intent in failing to

report his spouse's income that is copied virtually verbatim from his "Supplemental Memorandum" submitted at the hearing below. *Compare* IAF 3, Tab 20 at 1-12 *with* PFRF, Tab 1 at 10-21. This lengthy reiteration of his arguments made below constitutes mere disagreement with the administrative judge's explained fact findings and credibility determinations, and therefore does not warrant full review by the Board. *See Hillen v. Department of the Army*, 35 M.S.P.R. 453, 458 (1987); *Weaver v. Department of the Navy*, 2 M.S.P.R. 129, 133-34 (1980), *review denied*, 669 F.2d 613 (9th Cir. 1982) (per curiam); I.D. at 11-14. Even if we were to consider this argument, we find that the appellant's conduct in failing, for 2 consecutive tax years, to report approximately $6,000 in income, including $2,000 to $2,500 from simple wages and tips, given the appellant's tax expertise and the elementary principle of tax law at issue, is gross negligence or "willful blindness" and constitutes sufficient proof of intent. *See Monaco v. Department of the Treasury*, 15 M.S.P.R. 727, 730-31 (1983); I.D. at 12-14; *see also Mooney v. Department of Defense*, 44 M.S.P.R. 524, 526-27 (1990) (the intent to submit a false official document may be inferred from the appellant's reckless disregard for the truth or his reckless disregard for ascertaining the truth).

We therefore find that the agency's charge is supported by a preponderance of the evidence.

The penalty of removal is reasonable.

The appellant asserts that the penalty of removal is unreasonable because he was not culpable. *See* PFRF, Tab 1 at 22-26. In light of our analysis above, this argument lacks merit.

The appellant also contends that the deciding official failed to consider the relevant mitigating factors. *See id.* Our review of the record shows that the deciding official testified at length with regard to the penalty. *See* Hearing Tape (H.T.) 3, 4. He testified that the appellant's position involved public contact, that the charged conduct occurred over 2 years, and that the appellant's position required specialized knowledge of the IRC. *See* H.T. 3, Side 1. He further testified that, while the appellant had no previous disciplinary record, this was not a mitigating factor in light of the seriousness of the offense. *See id.* He stated that the appellant's failure to fully report his spouse's income could not have been inadvertent or a mere technical error, and that all agency employees were reminded annually of the agency standards of conduct and the employees' duty to file accurate Federal income tax returns. *See id.* He also stated that the penalty imposed on the appellant was consistent with those imposed on other employees for like offenses, and that any penalty short of removal would be inadequate because the appellant's position required him to testify in court against alleged tax evaders, and the charged conduct in this appeal would be a basis for impeaching his testimony and compromising

such tax cases. *See id.* Furthermore, he testified that, because the agency's administration and enforcement of the tax laws depends on the voluntary compliance of every taxpayer in the country, the agency's mission would be seriously impaired if the public discovered that the agency's own Criminal Investigators did not comply with the IRC. *See* H.T. 2, Side 2.

The administrative judge fully considered the deciding official's testimony and found that he fully considered the relevant factors in selecting the penalty of removal. *See* I.D. at 8-9, 15. We find under the circumstances of this appeal that the penalty of removal is within the limits of reasonableness. *See Monaco*, 15 M.S.P.R. at 730-31; *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 306 (1981); I.D. at 8-9, 15.

ORDER

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. *See* 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.